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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

against

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, CIA DE NAV. MAR. NETUMAR, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 11, 1974.

Citations of Opinions Below

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It is printed in Appendix A hereto, *infra*, p. A5. The memorandum decision of the District Court also is not reported. It is printed in Appendix A hereto, *infra*, p. A1.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1974, and a petition for a rehearing with a suggestion for a hearing *en banc* was denied on February 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether operative negligence on the part of the vessel's crew or those for whom the shipowner is responsible relieves the shipowner of its absolute duty to furnish a seaworthy vessel?

2. Whether an Appellate Court in order to sustain a jury's findings has either the jurisdiction or authority to make findings and reach conclusions outside of and contrary to the record?

3. Whether a finding of seaworthiness is inconsistent with and precludes a finding of negligence with respect to the same condition?

4. Whether a shipowner who appoints a competent stevedore is precluded from indemnity if he does not supervise the operation so as to prevent the stevedore from breaching its warranty of workmanlike service?

Statement

The plaintiff, a longshoreman, sustained an injury to his left foot on November 5, 1970, when it became caught between some pipe which he and other longshoremen in the employ of International Terminal Operating Co., Inc., (I.T.O.) were loading and stowing in a pipe bed which had been constructed on the weather deck of the SS MOSQUEIRO by marine carpenters in the employ of New Jersey Export Marine Carpenters, Inc. (New Jersey Export).

The SS MOSQUEIRO, which at the time was berthed at Pier 36, East River, New York City, was owned by Cia De Nav. Mar. Netumar (Netumar).

The plaintiff sued both New Jersey Export and Netumar. He alleged that New Jersey Export was negligent and had breached its warranty to construct a pipe bed which would not fail in normal use. Netumar was also alleged to have been negligent and the SS MOSQUEIRO unseaworthy because the pipe bed was not fit for its intended use.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the matter in controversy exceeding, exclusive of interests and costs, the sum of ten thousand dollars, and trial by jury was demanded.

Both New Jersey Export and Netumar impleaded I.T.O. alleging that I.T.O. breached its warranty to perform the loading operation in a safe and workmanlike manner.

The plaintiff, his hatch boss Ratliff, Brooks and Head, fellow-longshoreman, who were also working on the loading of the pipe into the pipe bed in question, were in complete agreement that until approximately 10:00 A.M. when the plaintiff's accident occurred, drafts consisting of two pipes were picked up by the ship's loading gear from a lighter which was berthed outboard of the SS MOSQUEIRO, raised aboard the vessel, and lowered and landed gently onto the pipe already stowed in the pipe bed. They were also in complete agreement that the loading operation proceeded without any difficulty, that one or more uprights broke, and that when the accident happened the pipe in the bed was below the height of the uprights.

According to the plaintiff, when his accident occurred he was standing with his left foot resting on a pipe, which had been previously loaded into the bed, and was reaching across the pipe in order to disengage a hook from the forward end of one of the two pipes which had just been landed. It was his contention that some of the pipe at the forward end of the pipe bed shifted pinning his left foot under or between the pipe.

On redirect examination, Montella, New Jersey Export's General Manager and Foreman, the bed builder, who was not a witness to the accident, was permitted to testify over objection that when he reached the scene of the accident after the pipe had been moved in order to free plaintiff's left foot, he observed that the pipe was stowed much higher than the upright. Montella also testified that no matter what size pipe, diameter pipe or length pipe goes into that bed, the way I make a bed it will hold anything, and that after inspecting the split upright following the plaintiff's accident, and noting that it had round markings on it he could tell that the cause of the split was damage by the longshoremen in permitting the pipe to come into contact with it in the course of the loading operation.

On recross-examination Ratliff was emphatic that the only reason why it was not good practice to load the pipe above the height of the upright was because the pipe would roll out of the bed.

Captain William Wheeler, an expert witness called on behalf of I.T.O., testified that it is good practice to load the pipe over the uprights.

No claim of overloading was ever urged. In its charge to the jury the Court specifically restricted the negligence claim respecting stowage and the loading operations to supervision of the cargo operations and the manner used to load, stow and carry the cargo. Thus, not only was the alleged overloading not an issue submitted to the jury, but under the Court's charge, a finding of overloading was not only not permissible, but was contrary to the Court's charge.

There was no testimony that any of the ship's officers, or anyone for whom the shipowner would be responsible, directed, interfered with, or in any way was involved in the loading operation.

After trial before the Hon. Robert J. Ward and a jury on October 29, 30, November 1, 2 and 5, the case was submitted to the jury on written questions. New Jersey Export was found free of negligence and not to have breached its warranty to construct a proper and adequate pipe bed. Netumar was held to have been negligent but the SS MOSQUEIRO was found to be seaworthy. The plaintiff was found free of contributory negligence but I.T.O. was found to have breached its warranty of workmanlike service. Netumar however was denied indemnity because the jury found that its conduct precluded indemnity. Damages in the sum of $42,000.00 were awarded the plaintiff and judgment in accordance with the jury's answers to the questions was entered against Netumar.

Within ten days from the date the jury returned its verdict, Netumar moved for judgment notwithstanding the verdict or for a new trial. Judge Ward denied the motion.

Netumar then filed a notice of appeal and plaintiff filed a notice of protective cross appeal.

The appeal was argued on November 14, 1974 and decided and filed December 11, 1974. The United States Court of Appeals for the Second Circuit affirmed the judgment. The ground for affirmance was that the jury could have found that the accident was caused by overloading of the pipe crib, an issue that was not supported by the evidence, was not in issue, was never argued and was not submitted to the jury.

The defendnant Netumar then petitioned on December 26, 1974 for rehearing with a suggestion for a hearing en banc.

In the petition, Netumar, urged the Court to consult the tapes on which the argument was recorded to confirm that counsel for plaintiff unequivocally stated that overloading was not an issue submitted to the jury and that he had not argued overloading in his summation. Furthermore, a request was made for a copy of that portion of the transcript of argument (at Petitioner's expense) and that it be made part of the record in this case.

The petition further stated, in addition to the fact that overloading was not an issue submitted to the jury nor charged, that the law applied conflicted with decisions of the United States Supreme Court in holding that an isolated act of negligence on the part of the ship's crew no longer renders a vessel unseaworthy. Furthermore, some of the findings made by the Court were clearly unsupported by and contrary to the record.

The petition was not denied until February 3, 1975.

Reasons for Granting the Writ

1. The decision of the Court of Appeals for the Second Circuit misinterprets the decisions of this Court in *Usner* v. *Luckenbach Overseas Corporation,* 400 U.S. 494 and *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, and is in

conflict with the landmark decision in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 and such other decisions as *Crumady* v. *J. H. Fisser*, 358 U.S. 423 and *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724.

In *Usner* v. *Luckenbach Overseas Corporation, supra*, this Court held that the operational negligence of an employee of an independent contractor, occurring at the moment of injury to a co-worker, does not render a vessel unseaworthy. In its opinion this Court was careful to point out that its decision was not intended to change the doctrine of liability based on unseaworthiness as it has been developed over the last 25 years. It specifically noted that a vessel was unseaworthy if the method of loading her cargo or the manner of its stowage was improper.

The Court of Appeals, however, construed this decision and the decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 to mean that the misuse of seaworthy equipment by the ship's crew or those for whom the vessel is responsible, no longer renders the vessel unseaworthy but is nothing more than operative negligence. Their construction is contrary to the rulings of this Court which said in *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724, at pages 726-727:

> "And in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. ed. 2d 413, 79 S. Ct. 445, 15 NCCA3d 265, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy."

In *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, this Court rejected the contention that negligence of the ship's crew relieved the shipowner of the duty to furnish a seaworthy appliance. It said at page 103:

> "Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of

the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging."

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, when this Court stated that there is a "complete divorcement of unseaworthiness liability from concepts of negligence" it was not holding that the act occurring at the time of injury was determinative on the question of liability as the Court below seems to construe it. In the *Mitchell* case this Court held that liability for an unseaworthy condition which arises during the course of a voyage is not dependent, as in negligence cases, on whether the condition existed for a time long enough for the shipowner to have learned about it and removed it, but was absolute. In stating that there was a complete divorcement of unseaworthiness liability from negligence concepts, this Court was holding only that the elements which were necessary to establish negligence had no part in establishing liability under the doctrine of seaworthiness.

2. The Court of Appeals went outside the record and found facts and reached conclusions that were unwarranted by the evidence.

The Court of Appeals concluded that confusion existed because of the "hurry and bustle of attempting to conclude the stowage in time for the vessel to sail." There was neither evidence nor claim that the sailing time of the vessel in any way was a factor in the loading operation. This therefore was not only a gratuitous but an erroneous conclusion by the Court.

The Court further stated unequivocally that there was *expert* testimony that it was bad practice to load pipe to a point well above the tops of the uprights of the crib. Again there was no evidence whatsoever to support this statement which should compel reversal. The only expert who expressed any view on this stated that such loading was good practice.

These are only some of the several statements of fact which the Court made that are not supported by the record, or contrary thereto.

The Court below therefore exceeded its jurisdiction both in determining matters not raised or passed on in the trial court, and also in making fact findings having no support of any kind in the record or being absolutely contrary thereto.

3. The decision below denies petitioner the right guaranteed by the Seventh Amendment to have all issues determined by a jury. As this Court held in *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, it is reversible error for a Court to resolve an issue which has not been submitted to and passed on by the jury.

On the argument of the appeal it was conceded by counsel for the injured longshoreman that overloading was not an issue on which the case was submitted to the jury.* The trial judge also did not charge the jury on any such issue and during the trial refused to permit any testimony on how much pipe the pipe bed could hold.

The decision of the Court below is not based on the record or issues raised below. It is axiomatic that an Appellate Court cannot take cognizance of matters not passed upon in the Court below and exceed its jurisdiction when it formulates its own fact findings without regard to the record and contrary thereto.

In its opinion the Court stated that: "There is no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedores." However, it was undisputed that while

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* Oral argument was recorded on tape. Petitioner's request for a transcript of the argument made on the motion for rehearing was denied. It appears to be the rule of the Court of Appeals for the Second Circuit that transcripts of the oral argument are not available to counsel and that any written applications for such transcripts are not to be accepted from counsel. Apparently a transcript, however, would be furnished this Court if requested.

petitioner's Port Captain in conjunction with the ship's Master and Chief Officer drew up and approved the proposed stowage plan, it was subject to the approval of the stevedore. The stevedore, therefore, not only knew about the stowage of the pipes, but the plan itself of the stowage aboard the SS MOSQUEIRO had received the final approval of the stevedore. It was also undisputed that under the arrangement existing at the time, the stevedore was responsible not only for the manner of bringing the cargo aboard, but the manner of loading it, and that the ship's supervision was concerned only with shipboard stability and contamination of one cargo with the other.

4. The decision of the Court of Appeals for the Second Circuit is in conflict with decisions of other courts of appeals, particularly *H & H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F. 2d 711 (9th Cir. 1967), and *Nosal* v. *Calmar Steamship Corporation*, 339 F. Supp. 1235, aff'd without opinion, 475 F. 2d 1395 (3d Cir. 1973).

In *H & H Ship Service Co.* v. *Weyerhaeuser, supra*, the Court held that a vessel owner was entitled to indemnification from substandard performing stevedore, unless the owner acted seriously to impair the stevedore. Furthermore, the Court indicated that where the vessel owner's conduct does not amount to preventing or seriously handicapping the stevedore, the vessel owner, as a matter of law, is not to be precluded from indemnification and that conduct which amounts to such handicap may not necessarily preclude indemnification.

The Court of Appeals in this action held that not only action, but inaction on the part of the shipowner could preclude indemnity. Inaction can never be sufficient to preclude indemnity in the opinion of the Ninth Circuit, *Weyerhaeuser*.

Another conflict exists in the ruling of this Court which held there was no inconsistency in holding that a ship could

be seaworthy and that the owner could negligently cause the accident.

In *Nosal* v. *Calmar Steamship Corporation, supra,* the Court held that just as it would be erroneous to hold that negligence must be established in order to prove unseaworthiness, so it would be erroneous to hold that negligence could exist in the absence of unseaworthiness. The Court in this action held that there was no inconsistency between the finding that the vessel was not unseaworthy and that the accident was caused by the shipowner's negligence. Clearly the finding was inconsistent.

As to indemnity from the stevedore, the decision of the Court of Appeals for the Second Circuit is in conflict with *Ryan* v. *Pan Atlantic Corp.,* 350 U.S. 124, *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.,* 355 U.S. 563, and *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315.

The *Ryan* case, *supra,* held that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's improper stowage of cargo.

Nacirema, supra, held if the stevedoring company renders a substandard performance which led to liability of the owner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude indemnity. Furthermore, the right to indemnification is not defeated by the shipowner's own negligence. The *Italia Societa* decision, *supra,* held that the warranty of workmanlike performance is not lessened or avoided by the absence of negligence on the part of the warrantor.

In the action at bar, the Court has held that the failure of the shipowner's Port Captain to supervise the loading and his prior conduct and statements were sufficient to preclude indemnity. The holding is clearly erroneous and in conflict with the aforementioned decisions of the Supreme Court.

Initially, the shipowner had no duty to supervise the loading and stowage that it had turned over to the stevedore. Even assuming, *arguendo*, that it did, *Ryan, supra,* specifically held failure to inspect, correct and detect the unsafe condition does not prevent recovery.

Furthermore, the prior conduct and statements of the ship's Port Captain could in no way be construed as being either actively or passively negligent. The Captain did not direct, interfere with, nor was he in any way involved in the loading operation.

The jury found the ship seaworthy, and based on the charge, found by implication a safe place to work, that the pipe bed structure and fence were reasonably fit for the uses intended and that the method used for stowage of cargo was suited for safe operations. Therefore, it is not only illogical but absurd to hold that the shipowner was negligent in permitting the pipe bed to be overloaded though it was reasonably safe for its intended use and the place of work was safe, and that the shipowner by action or inaction hindered a safe method of stowage operations.

Conclusion

The questions raised are of sufficient importance to require review by this Court. Not only do they involve the proper interpretation and application of the law as it has been construed and defined by this Court, but also the authority and jurisdiction of the Court on review of a judgment entered on a jury verdict.

Respectfully submitted,

Victor S. Cichanowicz
Counsel for Petitioner
80 Broad Street
New York, N. Y. 10004

Opinion of District Court on Motion to Set Aside Verdict.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

Plaintiff,

against

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR. NETUMAR,

Defendants and Third-Party Plaintiffs,

against

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant.

Defendant and third-party plaintiff Cia de Nav. Mar. Netumar ("the shipowner") moves pursuant to Rules 50(b) and 59(a), Fed. R. Civ. P., for an order setting aside the verdict against it, and for judgment in its favor either dismissing the complaint or granting it indemnity, or in the alternative for a new trial. For the reasons which follow, the motion is denied.

Plaintiff, a longshoreman, testified that on November 5, 1970 while he was engaged in loading pipe into a pipe bed built by the co-defendant New Jersey Export Marine Carpenters, Inc. ("the carpenters") alongside the number 1 hatch on the shipowner's vessel, one or more of the

pipe bed uprights broke, as a result of which a length of pipe weighing approximately 1,800 pounds rolled onto his foot, causing injuries.

This action was brought by plaintiff against the carpenters and the shipowner who denied liability, cross-claimed against each other and impleaded the third-party defendant. The questions of whether either or both of the defendants was negligent, as well as the questions of whether the vessel was unseaworthy, whether the carpenters breached any warranty or workmanlike performance, whether plaintiff was negligent, whether the third-party defendant breached its warranty of workmanlike performance and whether any conduct of the shipowner prevented it from recovering indemnity from the third-party defendant were submitted to the jury.

In answers to twelve special interrogatories the jury found the shipowner negligent, and found in favor of the plaintiff, the carpenters and the third-party defendant, respectively.

The shipowner concedes that "on a motion under Rule 50(b) the evidence must be viewed in the light most favorable to the party other than the movant and the motion should be granted if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against him." *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970).

Although the Court might well have reached a different result had the case been tried to the Court alone, there is

sufficient probative evidence to support the verdict and reasonable and fair-minded men in the exercise of impartial judgment could arrive at the verdict reached by the jury.

William Montella, the carpenters' foreman, testified that Richard A. Piper, the port captain for the shipowner, told him exactly what to do in connection with the construction of the pipe bed including what nails and lumber to use. Moreover, he testified that he was not told how many pipes were to be stowed in the pipe bed beside the number 1 hatch or how much they weighed, nor was he shown the stowage plan. Significantly, the jury asked to see the stowage plan. Mr. Piper testified in a portion of his deposition which was read to the jury that the pipe bed was constructed pursuant to oral instructions which he gave to Mr. Montella and also that as port captain he was responsible for the loading of the vessel in conjunction with the ship's officers.

The foregoing evidence would be consistent with the finding of the jury that the vessel was seaworthy and that the carpenters performed their duties in a workmanlike manner. It is also consistent with the finding that the shipowner's conduct was sufficient to preclude indemnity because it exercised overall control over the construction of the pipe bed and the loading of the vessel.

The Court finds that the probative evidence is adequate to support the conclusion that the shipowner failed in its non-delegable obligation to furnish plaintiff a reasonably safe place to work. Despite the incidental delegation of certain functions to others, in this case the carpenters and the third-party defendant, the shipowner remained responsible for performing the overall operation with reasonable care. Its failure to perform the overall operation with reasonable care created an unsafe condition and

properly resulted in the jury's finding of liability. Accordingly, the shipowner's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, is in all respects denied.

It is so ordered:

Dated: December 10, 1973.

ROBERT J. WARD,
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 66—September Term, 1974.

(Argued November 14, 1974 Decided December 11, 1974.)

Docket No. 74-1344

JOAQUIM CONCEIÇAO,

Plaintiff-Appellee,

—against—

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant and Third-Party Plaintiff-Appellee,

and

CIA. DE NAV. MAR. NETUMAR,

Defendant and Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

MEDINA, FRIENDLY and GURFEIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge.*

Cia. De Nav. Mar. Netumar, shipowner, appeals from a judgment granting damages for personal injuries to plaintiff and dismissing a cross-claim against New Jersey Export Marine Carpenters, Inc., and a third-party complaint against International Terminal Operating Co., Inc. There is also a protective cross-appeal by plaintiff.

Affirmed.

GEORGE J. DUFFY, Hoboken, New Jersey, (Baker, Garber, Duffy & Baker, Hoboken, New Jersey, on the brief), *for Plaintiffs-Appellee.*

WILLIAM F. LARKIN, New York, N.Y., (Larkin, Wrenn & Cumisky, of Counsel to Coppola & D'Onofrio, New York, N.Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellee.*

VICTOR S. CICHANOWICZ, New York, N.Y., (Cichanowicz & Callan, New York, N.Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellant.*

ALBERT V. TESTA, New York, N.Y., (Sidney A. Schwartz and Alexander, Ash, Schwartz & Cohen, New York, N.Y., on the brief), *for Third-Party Defendant-Appellee.*

MEDINA, *Circuit Judge:*

The SS Mosqueiro sailed from Pier 36, East River, New York City on her overseas voyage on November 5, 1970. That morning the task of loading and stowage was nearing completion and the parties to this appeal were

performing or failing to perform their respective functions in connection with the removal from a lighter, moored to the offshore or port side of the vessel, of a large quantity of huge steel pipes and stowing them on the forward weather deck of the vessel. In connection with this loading and stowing operation, one of the pipes was dislodged and rolled over the foot of the plaintiff, a longshoreman, causing the injuries on account of which the jury awarded him $42,000 damages.

There is no satisfactory proof in the record of the exact number of pipes actually lifted from the lighter and stowed on the forward deck of the vessel. But, as we shall see, the number of pipes was large. They were 30 to 40 feet long, about 18 inches in diameter and each weighed considerably more than a ton. Speaking in broad terms the functions of the parties to this appeal, in connection with the operation of removing the pipes from the lighter and stowing them on the forward weather deck of the vessel were: (1) it was the obvious duty of the shipowner, Cia. De Nav. Mar. Netumar, to decide where and how the pipes were to be stowed; (2) in connection with the stowage in a place where, during the voyage, heavy seas might be encountered, orders were given on behalf of the shipowner to New Jersey Export Marine Carpenters, Inc. (The Carpenters), to build cribs, crates or wooden pipe beds into which the pipes could be lowered and stowed by the winchman and the longshoremen, and two of these wooden pipe beds were built; (3) the actual loading and stowing were done by longshoremen such a Conceicao employed by the stevedore, International Terminal Operating Co., Inc. (ITO). These longshoremen in the employ of ITO included the winchmen, the hatch boss and, in this case, 8 longshoremen, including the plaintiff, who were stationed on top of the hatch covers at hatch No. 1 to guide the drafts into place in this pipe bed on the starboard or inshore side of the hatch.

Conceicao sued the shipowner, claiming that the unseaworthiness of the vessel and the negligence of the shipowner were proximate causes of the accident, and The Carpenters, claiming that a breach by The Carpenters of its implied warranty of workmanlike performance was a proximate cause of the accident. Each of these cross-claimed against the other, and they also asserted a claim against ITO as a third-party defendant.

The case was tried to Judge Ward and a jury. In answer to written interrogatories the jury found:

(1) That the vessel was not unseaworthy but that the shipowner was guilty of negligence that was a proximate cause of the accident, thus establishing plaintiff's claim against the shipowner, exonerating plaintiff of any contributory negligence and fixing the damages at $42,000.

(2) That The Carpenters had not breached any warranty of workmanlike performance that it owed plaintiff, thus finding no liability on the part of The Carpenters for improperly constructing the pipe bed.

(3) That ITO had breached its warranty of workmanlike performance of the stevedoring operation and that this breach was a proximate cause of the accident, but that the conduct of the shipowner had been such as to prevent the shipowner from recovering indemnity from ITO on the claim against ITO as third-party defendant. In terms of the instructions to the jury this meant that indemnity was denied because the jury found that the shipowner "by some action or inaction * * * prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

The result of these findings was a judgment in favor of Conceicao and against Netumar for the amount of damages fixed by the jury. The claims and cross-claims against The

Carpenters and ITO were dismissed. The trial judge on December 10, 1973 filed an unreported opinion denying the shipowner's motion to set aside the verdict and for judgment in its favor either dismissing the complaint or granting it indemnity against ITO or in the alternative for a new trial. The shipowner appeals. There is also a protective appeal by Conceicao.

I

How the Accident Happened and the Issues on This Appeal

There was evidence from which the jury was justified in concluding that on the morning of November 5, 1970 there was a lighter on the port or offshore side of the Mosqueiro and on this lighter were the heavy pipes to be loaded and stowed on the vessel. Alongside the port and starboard No. 1 hatches, which were those nearest to the bow of the vessel, The Carpenters had constructed two wooden pipe beds or cribs. In loading the starboard or inshore crib the pipes were lifted, two at a time, from the lighter, swung across the No. 1 hatches and guided by the longshoremen, who were standing on the closed and battened down hatch covers of the starboard hatch No. 1, to a position just over the pipe crib. Then the two pipes were lowered gently into the crib. As soon as the pipes were in place, a longshoreman at both the bow and stern end of the pipe would step forward from his position on the hatch covers and release the hooks holding the pipes.

There was ample testimony concerning the proper manner of building a pipe crib and concerning the manner of building this particular crib. It was made of new lumber with a number of whalers at the bottom and sturdy uprights about five feet high at intervals of five feet. The whole affair was tightly wedged against the steel coaming

of the hatch on one side and similarly wedged against the rail of the vessel on the other.

The testimony of plaintiff and others was to the effect that the draft of two pipes was gently lowered to a place about the center of the stow of pipes, that he stepped forward to release the hook at his forward end of the pipes when one or more of the uprights broke apart, "the pipes moved" and his foot was crushed. This was the last draft loaded into the starboard crib. The very considerable number of remaining pipes was not placed in any crib but was stowed athwartship over the port and starboard No. 1 hatch covers. Before this draft pipes had been stowed to the top of the uprights and there is some testimony to the effect that pipes had been loaded to a point well above the tops of the uprights. There is expert testimony that this was bad practice. In any event, one or as many as three of the uprights broke apart and, as the pipes in the stow shifted, one of them caught Conceicao's foot. Only the forward end of the stow shifted, as the after end of the load of pipes rested against the deckhouse on which the winches and the winchmen were located.

We think it too clear for extended discussion that the jury had before it proof to justify a finding that the pipe crib was in every respect properly built by The Carpenters and that the findings that the vessel was seaworthy and that The Carpenters had not breached their implied warranty of workmanlike performance must stand. The pipe crib was fit for the purpose for which it was intended to be used. We also think the evidence justified a finding by the jury that a stevedore with expertise and special competence in the loading and stowage of vessels, including the filling of pipe cribs, should know enough not to overload a pipe bed and cause some of the uprights to break off and dislodge some of the pipes. Findings that ITO had breached its warranty of workmanlike perfor-

mance and that this breach was a proximate cause of plaintiff's accident are supported by sufficient evidence.

The substantial questions on the appeal concern the finding of negligence on the part of the shipowner and the additional finding that the shipowner had acted or failed to act in such a manner as to defeat the shipowner's claim for indemnity against ITO.

II

The Shipowner Was at Fault in Many Respects

The deposition of the shipowner's Port Captain, Richard A. Piper, was read at the trial. It was his job to lay out the stowage of all outbound cargo and to supervise the loading in conjunction with the Master and Chief Officer of the vessel. What the jury could have found was that, although Piper knew the exact quantity of pipes to be loaded and already had decided that three pipe beds were necessary, two at No. 1 hatch and another at No. 2 hatch, as is clearly shown on the Stowage Plan that was received in evidence as Plaintiff's Exhibit 4, he did not show the Stowage Plan to William Montella, the foreman of The Carpenters, nor did he tell Montella the quantity of pipes to be loaded. While Piper insisted that he did tell Montella how many pipes were to be loaded and that he ordered three pipe beds, including the one at No. 2 hatch that was to stow 72 pieces of pipe according to the Stowage Plan, these statements were denied by Montella and it was a function of the jury to decide which witness to believe.

It appears from Piper's deposition that he was not present at the time of the loading and stowage and that he did nothing to supervise the operation. Later, he did appear at the scene of the accident. Assuming, as we

must, that Piper had failed to give the necessary information to The Carpenters, we think it was proper for the jury to conclude that it was negligence not to give this information to those who needed it and that it was also negligence not to do something by way of supervision to cure this omission. There is no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedore. That the jury could have found that the accident was caused by the overloading of the pipe crib is perfectly plain to us. The testimony that, even if additional pipes are loaded at the top of the pile and in the middle, there are lateral forces at work in the pipe crib, is not disputed. Moreover, this is a simple matter of physics, and the height of the pile of pipes and the breaking of one or more of the uprights support the inference of overloading. The jury did not have to believe Montella's opinion that one of the drafts had been carelessly handled and hit one of the uprights and split it.

That something went wrong cannot be doubted. The third pipe bed at hatch No. 2 was not built. Before the accident Piper did not even look at the pipe beds that were built and he did not know that the third pipe bed had not been built. A large quantity of pipes were stowed athwartship on top of the hatch covers at hatch No. 1. The loading of pipes in the starboard pipe bed was up to the top of the uprights or higher. And the necessary information for the proper conduct of the loading and stowage operation had not been given to those to whom the information was indispensable if they were to do a proper job. When these pieces of proof are put together, we think there was ample to justify a finding that the shipowner had failed to give this particular part of the loading and stowage operation the necessary supervision,

and that this failure of supervision was a proximate cause of the accident. This same combination of items of proof in the testimony of the various witnesses we think justifies the finding that the shipowner was not entitled to indemnity from ITO because the shipowner had "by some action or inaction • • • prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

For some reason, which is not clear to us, the shipowner seems to think that "inaction" by the shipowner could not possibly constitute negligence. We are unaware of any general distinction between "action" and "inaction" in the field of liability for negligence. Everything depends upon the facts and circumstances of the particular case. Here there was evidence from which the jury might find that, because of the misinformation given by Piper to Montella concerning the requisite number and location of the pipe beds to be built and his failure to advise concerning the large number of pipes and the places where they were to be stowed, as appeared in the Stowage Plan, there resulted the confusion and excess of pipes that the jury could have found were a proximate cause of the overloading. In the hurry and bustle of attempting to conclude the stowage in time for the vessel to sail on November 5th the jury might have found that the shipowner was negligent in ordering too much pipe to be loaded at hatch No. 1 or that the shipowner had ordered too much pipe to be stowed on the weather deck of the vessel in the first place. The jury may well have thought that, had Piper been at the scene at the time the stowage of the pipes commenced, he would have at once known that the directions he thought he had given had been disregarded and that in the endeavor to stow at hatch No. 1 more pipes than the crib would hold there was a probability of overloading the crib.

III

The Law

A

One of the most interesting developments of judge-made law in modern times commenced with the decision by the Supreme Court in *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946), which treated longshoremen and other shore workers as seamen because the work by these longshoremen and shore workers was said to be the same as was anciently performed by seamen. This made it possible for these longshoremen and shore workers to by-pass the limited recoveries provided by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901ff, and to obtain very much larger recoveries by way of damages fixed by the juries who decided the cases under the Jones Act. In the course of time we faced an infinite variety of cases where there was interplay between the shipowner's warranty of seaworthiness of the vessel and its appurtenant appliances and equipment, the newly expanded implied contract of workmanlike performance and the long standing doctrine of negligence. It was not very long before the various court decisions had construed the warranty of seaworthiness and the doctrine of negligence in so many different ways as to make it difficult or perhaps impossible for conscientious judges to know how to instruct juries or make decisions in specific cases. That the two rules, unseaworthiness and negligence, were wholly distinct and separate was finally clarified by the landmark opinion of Mr. Justice Stewart in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In the course of time this Court decided *Grillea* v. *United States*, 232 F.2d 919 (1956), and there ensued a number of decisions both in the Second Circuit and in other circuits

that interpreted in various ways situations where a negligent act by the stevedore was held to be or not to be the creation of a condition that made the vessel unseaworthy. On the one hand, it was thought that if the single act was more than simply part of the "continuous courts of operation" of the stevedore, unseaworthiness of the vessel might be found, whereas if the defect was solely an isolated instance that arose in the course of the work, it was negligence on the part of the stevedore and not unseaworthiness of the vessel. On the other hand, some cases held that unseaworthiness could not result from operative negligence. Some of the decisions of this Court, and particularly the dissent of our brother Friendly in *Sribrinski* v. *Waterman Steamship Corporation*, 360 F.2d 539 (1966), indicated the unsatisfactory state of affairs and the conflicts of authority in the various circuits. Fortunately for us, this difference of opinion was set at rest by the Supreme Court in 1971 in *Usner* v. *Luckenbach Overseas Corporation, et al.*, 400 U.S. 494. Again, the clarifying opinion of the court was written by Mr. Justice Stewart. In that case the longshoremen were stowing cargo from a barge positioned alongside the vessel. The winchman operating the winch and boom at a hatch had lowered the draft, but he did not lower it far enough. One of the longshoremen motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall farther. But the winchman lowered the fall too far and too fast and the swing of cargo knocked one of the longshoremen to the deck of the barge and caused his injuries. This is precisely the same as if, in the present case, the winchman, instead of lowering the two drafts of pipes gently into the pipe crib, had dropped them down with a bang and thus dislodged some of the pipes. And this in turn is the equivalent of the single, separate act of overloading in the

case before us which caused the breaking of the uprights and a dislodgment of the pipe which rolled upon the plaintiff's foot. Here we see a perfect illustration of the difference between unseaworthiness and operative negligence.

We can find no such inconsistency between the finding that the vessel was not unseaworthy and the finding that the accident was caused by the shipowner's negligence, as is claimed by the shipowner on this appeal. The decision in *Usner* repeats the teaching of *Mitchell* that there is a "complete divorcement of unseaworthiness liability from concepts of negligence." The Court stated, 400 U.S. at page 500:

> What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.

In footnote 19 the Supreme Court expressly rejected the interpretation of *Mascuilli* v. *United States*, 387 U.S. 237 (1967) that negligence might create "instantaneous unseaworthiness," an interpretation which the Second Circuit had adopted in *Candiano* v. *Moore-McCormack Lines, Inc.*, 382 F.2d 961 (1967), *cert. denied*, 390 U.S. 1027 (1968).

Although the Supreme Court in *Usner* spoke to a situation in which neither the shipowner nor the crew were involved in the accident, the logic of the opinion applies with equal force to situations in which an isolated act of the shipowner proximately caused the accident. The jury might properly have concluded that the shipowner's in-

adequate instructions to The Carpenters created a further duty to supervise the actual loading of the pipes and that the breach of this latter duty as an excessive number of pipes were loaded into the crib was the isolated event which cast liability on the shipowner for negligence.

B

Although the stevedore was negligent, the jury properly found on sufficient evidence that the conduct of the shipowner precluded indemnity because the shipowner "by some action or inaction * * * prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

It is not simply the complete failure of Piper or any other representative of the shipowner to supervise the loading and stowage at hatch No. 1, it is the prior conduct and statements of Piper, which were "active," which created the situation which made the supervision especially necessary. Probably the jury found that this was a combination of "action" and "inaction."

It is historically true that the recovery of indemnity originated in cases where the shipowner was held liable for a breach of the absolute warranty of seaworthiness where the condition of unseaworthiness had been caused by the conduct of the stevedore. *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (2d Cir. 1962); *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956); *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958). And the right to indemnity has been extended to a case where there was a finding of negligence on the part of the shipowner. *Drago* v. *A/S Inger*, 305 F.2d 139 (2d Cir.) *cert. denied sub nom. Daniels & Kennedy, Inc.* v. *A/S Inger*, 371 U.S. 925 (1962).

It is clear that theories of "active or passive" or "primary or secondary" negligence are not appropriate in this type of case.

The shipowner was entitled to indemnity "absent conduct on its part sufficient to preclude recovery" and "the evidence on these issues * * * was for jury consideration under appropriate instructions." *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958). The allowance or disallowance of indemnity in this type of case depends upon a balance or interplay of the doctrines of unseaworthiness, negligence and breach of the implied contract of workmanlike performance that Judge Clark, in the leading case of *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (2d Cir. 1962), stated as follows, at p. 426:

> The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.

This test was approved and applied by the Supreme Court in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324-5 (1964).

We think it clear that the party to this case most able to minimize the particular risk involved was the shipowner since, on sufficient evidence, the jury found that there was "action or inaction on the part of the shipowner which prevented, hindered, or seriously handicapped the stevedore in performing a workmanlike job."

Affirmed.[1]

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1 As Conceicao was injured on November 5, 1970, the new provisions of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, are not applicable. See *Cooper Stevedoring* v. *Fritz Kopke, Inc.*, decided May 28, 1974 (—— U.S. —— (1974)).

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-four.

Present: HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
HON. MURRAY I. GURFEIN,
Circuit Judges.

JOAQUIM CONCEICAO,
Plaintiff-Appellee,

v.

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR NETUMAR,
Defendants and Third-Party Plaintiffs,

CIA DE NAV. MAR NETUMAR,
Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the defendant and third-party plaintiff-appellant Cia De Nav. Mar Netumar.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

A true copy.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk